No. 15,602

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT WILLIAM EVANS' PETITION FOR A REHEARING.

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APPELLANT WILLIAM EVANS' PETITION FOR A REHEARING.

To the Honorable Stanley N. Barnes and Frederick G. Hamley, Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now William Evans, one of the appellants herein, and respectfully prays this Court to grant a rehearing of the above-entitled cause, insofar as Count 3 of the indictment is concerned, and in support thereof respectfully shows:

possession and of supporting the judgment of conviction on Count 3.

Appellant concedes that (p. 10) "Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge . . . and control . . ."; also that (p. 11) knowledge and control may be inferred "Where one has exclusive possession of a home or apartment in which narcotics are found;" but respectfully asserts that there is not the tiniest shred of evidence in this record to support a finding of either "exclusive control and dominion" or "exclusive possession". The opinion itself (p. 11) states that appellant was "not in exclusive possession of the premises" and that therefore the inference of of knowledge cannot be made.

Without proof of possession—or facts from which such possession may be legally inferred—appellant's conviction cannot stand

> ". . . unless there are other incriminating statements of circumstances tending to buttress such an inference." (p. 11).

Thus—without reviewing at length the portion of the opinion dealing with the "marihuana count" appellant may say that this Court has determined that *only in the event* there are such "incriminating statements or circumstances" can the conviction be upheld. Appellant most respectfully submits that the evidence marshalled in the opinion (p. 11) as constituting "such additional incriminating statements and circumstances" is wholly insufficient to support any in-

ference of knowledge or control of the small quantity of marihuana here under consideration. He will endeavor to so convince this Court.[1]

In considering this evidence and its effect appellant asks this Court to keep in mind at all times *the presumption of innocence*—which is discussed more fully, with particular reference to its application here—in Part II of this petition.

> **"The evidence warrants a finding that Mildred was the only other adult who was present when the officers entered, and the only other adult who had access to the interior of the residence." (Emphasis added; Opin. p. 11.)**

It is to the emphasized statement that appellant takes exception. The evidence shows (without conflict) that Mildred paid the rent and was the named customer for gas and electric service (Opin. pp. 9 to 10). It shows that she resided there with two children—*one* of whom was the child of this appellant. It was admitted that this appellant had spent several nights there in the fifty-three days she had occupied the premises. It was established at the trial that this appellant resided during the period involved at Oliver's Restaurant at 1569 Ellis Street—operated by him and his co-defendant Josephine.[2] There is neither *showing nor intimation* that appellant *ever* resided at the Broderick Street address—or that he could have re-

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[1]And most respectfully asks that the justices reread pages 16 to 19 and 62 to 72 of Appellants' Opening Brief and pages 18 to 22 of Appellants' Closing Brief.

[2]The slip opinion says (p. 2) "William lived above the restaurant, but spent some of his nights at 953 Broderick Street, San Francisco. Josephine lived at 181 Thrift Street, San Francisco.

sided there. On the contrary, he was there so seldom in that period that any number of others might have occupied those premises with Mildred—perhaps a series of men, meretriciously or otherwise—perhaps relatives—perhaps women friends—perhaps the father of the other child.[3] Perhaps a tenant—perhaps a "baby sitter" while Mildred was engaged elsewhere in shopping—or visiting—or gainful employment. *There was not one word of interrogation—not one word of proof—as to such occupancy or non-occupancy. And the burden was not upon appellant.*

Why did not the Government interrogate Mildred—or William? They were both placed upon the witness stand and their testimony upon direct examination would have opened the field for this type of cross-examination. Why did not the Government interrogate its own agents? They testified that they had had the place under surveillance for a considerable period of time. Had they testified that in all that time they saw no adult going into that flat except these two there would be some evidence—however slight—from which the inference drawn by the trial judge—and by this Court—could be based. As the record stands, there is *nothing*. And the presumption of innocence clothes appellant.

Appellant arrived at 953 Broderick at 4:00 *in the morning—after the restaurant had closed.* There was ample nighttime prior to that in which one or many persons might have visited Mildred. The agents ar-

[3]Appellant was the father of only one of the children. (TR. p. 176.)

rived in about five minutes—they had not had the place under surveillance earlier that night. Mildred was not asked respecting any earlier callers. Any one of such earlier callers might have left the small quantity of marihuana concealed under the top stair carpet. Mildred could well have a marihuana smoking friend who called often and who kept his or her "weed" cached for ready use in what was thought to be a safe place.[4]

So many things could have happened *other than the placing there of this marihuana by appellant in the five minutes intervening between his arrival and that of the agents*—and during which time he also undressed in the bathroom. As the opinion itself says (p. 10) "It (the Government) was therefore required to prove that William had the twenty-two grains of marihuana in his possession". And as appellant shows under Part II of this petition, he is clothed with the garb of innocence until proven guilty by competent evidence—he cannot be convicted upon mere suspicion—and the burden of proof is upon the prosecution to establish that guilt. Furthermore, the facts establishing such guilt must be *consistent* with guilt and must be *inconsistent* with every reasonable supposition of appellant's innocence. And not only that—but there must be excluded every other hypothesis! True, these statements are truisms (elaborated upon in Part II)—true, they are known in both the

[4]Appellant, in fact, did not smoke at all (TR. p. 184). This statement is nowhere challenged. What would he be doing with a non-commercial quantity of marihuana?

heart and the mind of each of the Honorable Justices to whom this petition for rehearing is addressed, but appellant fears that in affirming the conviction upon Count 3 they have momentarily lost sight of these elementary principles.

Appellant can find reasons for such momentary oversight—reasons which he feels may have unconsciously swayed the minds of these justices to uphold the judgment of conviction. Appellant lists some of these possible reasons—*no one of which* he feels, is germane to the subject of his guilt or innocence upon the "marihuana count":

1. His two prior convictions on narcotic charges (but those involved the sale of heroin—this, only a "personal use" small quantity of marihuana).

2. His conviction upon three other counts in the same indictment. These convictions were set aside by this very Court and in this very opinion—but the Court indicates (p. 8) that the facts nevertheless gave rise "to a suspicion"—and the justices may have, subconsciously, failed to eliminate these charges from their minds.

3. The Price-Daniels Senate Committee Investigation of appellant and the adverse publicity resulting therefrom. This constitutes no evidence —it was brought into the record collaterally—but it may well have had a subconscious influence upon the justices in weighing the case.

4. Living meretriciously with his codefendant Josephine. The occasional relations with Mildred,

and the fathering of a child by her—the presentation to her of an automobile.

5. That the marihuana was found in a coin wrapper or envelope (Opin. p. 9) ". . . of the same type used to contain the heroin". It is obvious—upon reflection—that coin wrappers or envelopes are everywhere. They are provided free by all banks to all customers and their use is encouraged in order to save the time of the bank's tellers. Branch banks use such wrappers or envelopes in identical form for all of their branches—small banks purchase them from suppliers in form identical with that of other small banks. It is inconceivable that the mere fact that the small quantity of marihuana here involved was wrapped in a coin envelope "of the same type" (not even identical) could be a factor toward establishing the guilt of appellant. If there existed even the slightest doubt about it—that doubt would necessarily be dispelled by the fact that the conviction of defendant upon the heroin charge *was set aside by this very Court.*

6. There was some variance between the *testimony* of Mildred upon the witness stand and *statements* which the agents testified she had made to them upon the night of the arrest. These variances—affecting, as they might, the element of possession or non-possession of the premises at 953 Broderick by appellant—might easily have constituted an additional factor influencing this Court—but of course statements by the witness

(even if made) are no part of the evidence in this case—and *at the most* could only serve to impeach the veracity of the statements she did make upon the stand. She was not a party defendant—*and in no possible legal guise could such statements constitute evidence against appellant.* But they might—along with other matters here referred to—have resulted in the justices of this Court giving undue weight and importance to the conviction of this appellant upon extremely slender evidence—actually, as appellant contends, *non-existent* evidence.

Why was there no extended cross-examinination of Mildred? Or, actually, of this appellant? Both were offered as witnesses by appellant—both were sufficiently examined in chief to enable a wide and vigorous cross-examination to be based thereon. Is appellant now to be condemned by this Court to overcome the failures or short-sightedness of the Government?

Each—or any—or all—of these circumstances—even though appellant believes the justices of this Court would be the first to admit that they carried no *legal weight*—may have had a sublimal effect—and tended to influence to some extent the arrival at the conclusion that the conviction on Count 3, at least, should be sustained.

Appellant believes that from the foregoing it must now be obvious that this conviction should be—and must be—set aside—and that a rehearing should be granted for that limited purpose.

> "She (Mildred) denied knowledge of the presence of the narcotics or ownership of them. . . . The factfinder was entitled to accept her disclaimer, the result of which is to leave William as the only other person who could have placed the narcotics where they were found." (Opin. p. 11.)

Mildred did deny knowledge but the factfinder was warranted in "accepting her disclaimer" *only insofar as it affected Mildred.* How could appellant be thereby affected? Mildred was not a co-defendant. Nor does it follow that appellant remains the "only other person". Let us assume there were one hundred persons present—and that ninety-nine denied all knowledge of the packet. Does such a situation warrant the statement that appellant would then be "the only person who could have placed the narcotics where they were found?" Does such a statement exclude the presence of others—perhaps earlier? Does it exclude the possibility that the packet of marihuana had been in its concealed location for many days—or weeks—or months—or even years? Does not the cloak of the presumption of innocence intervene to avoid the conviction of *any* defendant of *any* charge in *any* court—against such mere conjecture? Is it not true, then, that the justices of this Honorable Court have placed reliance upon facts which should not have been relied upon? And which do not serve as a foundation for the conviction of this defendant?

> "When questioned about the marihuana, William asked if the answer would make any difference in obtaining a conviction. Upon being told that it might, he said, 'Well, I will try to figure out what you have against me first before I answer that.' Later, when told that Mildred was to be booked for joint possession of the marihuana, he said 'Well, you don't want to book her for that.' He denied knowledge of the presence of the narcotics, or ownership of them. The fact-finder, however, was not required to believe him, especially in view of his previous narcotics convictions." (Opin. p. 10, p. 11.)

The Court says that the quoted statements tended "to substantiate Mildred's disclaimer." (p. 11). Let us first bear in mind that these statements are based upon the testimony of the agents—appellant vigorously denies that he made any such statement. True, this creates a conflict and that conflict was resolved against appellant by the trial court, but we are here considering whether or not the conviction should be upheld and we may well inquire into *why* any sensible person would make such a statement. And appellant Evans appears to have been an intelligent and sensible man. What could he possibly gain by making the quoted statements (which he vigorously denies, Tr. p. 201)? He was required to make no statement (Opin. p. 11, note 11) and with two prior federal convictions it is quite likely he was familiar with that rule of law, which would make such statements even more improbable.

However, assume that he made them—what specific thing is there about them which denotes guilt? Nothing![5] He was "fencing" the agent said. But even

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[5]What is there about an *equivocal* answer which imports guilt? Under "Equivocal" the Funk & Wagnalls Standard Dictionary

though his responses (if made) may be interpreted as stupid—or as unwise—or as "fencing"—or as facetious (at a very poor time for facetiousness)—they simply *cannot* be twisted into an admission of guilt—and without such an admission there is *nothing* upon which to support his conviction.

> **"Both William and Mildred testified that he maintained no clothing, toilet articles, or other personal belongings at that address. This was not denied by the federal agents who thoroughly searched the premises." (Opin. p. 10.)**

It might appear to be a very small matter, but the non-possession by appellant of any single personal item—no matter how small or insignificant—is a circumstance so telling and effective (may appellant use the word "devastating"?) as to be wholly and completely incompatible with any slightest occupancy or possession or ownership by him of the flat at 953 Broderick, and, necessarily therefrom—equally incompatible with *possession* by him of the marihuana—the one element which this Court itself has said is a *sine qua non* to the sustaining of this conviction therefor. (Opin. pp. 10 to 11.)

Not only is the above quoted statement correct but the testimony itself—standing uncontradicted—shows with startling clarity that this appellant[6] *actually* had not a *single item* in that flat to indicate that *he had ever before set foot therein,*[7] much less have been residing

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says: "*Logic.* Two or more meanings." Where does that leave the presumption of innocence?

[6]Whom both the trial Court and this Court have found to have been in possession of the premises—and hence of the marihuana.

[7]True, he *had* been there before—he so testified—Mildred so testified—agents so testified.

there or in "possession" of it. Mildred had had that flat for 53 days—and there is naught in the record to show that her testimony that it was rented to her and that the utility bills were rendered to her, etc., etc., is untrue. Were they in fact untrue the Government would have offered proof thereof—particularly in a case as flimsy as this one. There is no testimony *(none)* to connect appellant with being the renter or with *any* occupancy—only a very occasional overnight stay. And what is the testimony disclosed by the record as to the absence of *anything* personal to appellant—*anything* that almost any person who occupied a furnished flat would have, presumably in the bathroom? We quote:

Testimony of Theodore J. Yannello (Tr. pp. 216 to 217)

The Court: What sort of search was made of the balance of the apartment?

A. Well, what we considered rather thorough. In the bedroom every drawer was taken out—not just pulled out, but it was pulled out and then taken off the frame on the chance that something might be stuck behind the shelf of the drawer. That was done to all the dressers in the apartment.

The clothes, whether they were dirty or clean, were gone into quite thoroughly. There were several suitcases in the apartment. Those were all emptied.

In the kitchen all the cups were looked into and pulled down and then put back. Any closets in the house were looked into. The carpet, as I recall, in the dining room or living room was pulled up to see if

there was anything underneath it. It was what we considered a fairly good and thorough search.

The Court: Did you examine the bathroom?

The Witness: Yes, sir.

The Court: What examination did you conduct in the bathroom?

The Witness: I personally didn't conduct and search, your Honor, but it was done by one of the other agents.

Testimony by Mildred Moore (Tr. p. 196)

Q. Did William Evans maintain any clothes at your flat?

A. No.

Q. Did he have any toilet articles, shaving equipment, toothpaste, things of that kind there?

A. No.

Testimony of Appellant William Evans (Tr. p. 189)

Q. Do you maintain any clothes or toilet articles or other property at the place were Mildred Moore lives, 953 Broderick Street?

A. No, I do not.

Nowhere is this testimony denied.

Is not the total absence of any such items of personal effects consistent with—and consistent *only* with—non-occupancy? And hence non-possession?

Petitioner and appellant most sincerely believes that by reason of the foregoing matters this Honorable Court has been led into error. Serious but inadvertent error—affecting the liberty of this petitioner and appellant. He believes with equal sincerity that upon having such error directed to their attention the

justices to whom this petition is directed will grant the requested rehearing and order that his conviction upon Count 3 be reversed.

PART II.

RECENT AND UNQUESTIONABLE AUTHORITIES SUPPORT THE CONTENTION OF PETITIONER THAT THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO SUPPORT THE CONVICTION AND THAT THE PRESUMPTION OF INNOCENCE HAS NOT BEEN OVERCOME.

Because the cases relied upon by appellant in his briefs are the same cases cited in the opinion by this Court it seems unnecessary to supply additional authorities as to such points. It is the *interpretation* of those cases as applied to the facts established in the instant case which is of consequence.

Petitioner respectfully directs the attention of this Court to the fact that the cases and authorities herein relied upon have not been copied bodily from a footnote to some text. Each has been developed by careful research—each has been carefully read with a view to its applicability—and the facts have been largely omitted only to limit the length of this petition and to conserve the time of the Court. Please note, also, that all of these cases are very recent and reflect the latest current developments of the federal law upon the subject.

THE AUTHORITIES ARE UNIFORM THAT THE PRESUMPTION OF INNOCENCE CLINGS TO THE DEFENDANT AND THAT UNLESS AND UNTIL OVERCOME THERE MUST BE AN ACQUITTAL.

In *Billeci v. United States* (1950—C.A., D.C.) 184 F2d 394, a case where the defendants had been convicted of maintaining a lottery the Court said, addressing itself to an instruction given by the trial judge (p. 403):

> "Moreover, other indestructible principles of our criminal law are pertinent to the comment of a judge upon the evidence. An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond a reasonable doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. *Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.*" (Emphasis added).

No better expression could be found of the right of presumption of innocence than that contained in the opinion in *Jencks v. United States* (1955) 226 F2d 540, where the Court of Appeals of the Fifth Circuit said (p. 547):

> "It is axiomatic that the presumption of innocence attended appellant at every stage of the trial, and that the burden remained upon the Gov-

> ernment throughout to prove each element of the crime charged beyond a reasonable doubt."

In *Brubaker v. United States* (1950) 183 F2d 894, appellant was convicted of violation of the Dyer Act. The conviction was reversed by the Court of Appeals of the Sixth Circuit, which said, at page 898:

> "The presumption of innocence attaches to an accused defendant at the beginning of a trial and remains with him throughout the trial of the cause. It never shifts."

In this Ninth Circuit, and speaking through Mr. Justice Hamley, one of the justices to whom this petition is respectfully directed, this Court reversed a conviction of manslaughter in the District Court of Alaska, in *Reynolds v. United States* (1956) 238 F2d 460. It is stated in the opinion (p. 463):

> "The presumption of innocence is predicated not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law. Wigmore points out that, while this presumption is another form of expression for a part of the accepted rule concerning the burden of proof in criminal cases, it does serve a special and additional purpose. It has been characterized as one of the strongest rebuttable presumptions known to the law. (Citing).
>
> The presumption of innocence was developed for the purpose of guarding against the conviction of an innocent person. It was not developed for the purpose of enabling the guilty to escape punishment. It is nevertheless perfectly plain

that the presumption, together with the related rule on the burden of proof, in guarding against the conviction of an innocent person, may in some cases prevent the conviction of a person who is actually guilty. Thus, where the prosecution is unable to muster evidence sufficient to overcome the presumption, there will be an acquittal, even though the defendant be actually guilty.

This is a calculated risk which society is willing to take. It does so because it regards the acquittal of guilty persons less objectionable than the conviction of innocent persons.''

WHEN A CONVICTION IS BASED IN WHOLE OR IN PART UPON CIRCUMSTANTIAL EVIDENCE A CONVICTION CANNOT STAND UNLESS THE EVIDENCE EXCLUDES EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

In *United States v. Dolasco* (1950) 184 F2d 746, there was an appeal from a conviction of theft in interstate commerce. The judgment was affirmed, but in doing so the Court of Appeals of the Third Circuit made this statement as to the law (p. 748):

> ''The question to be decided on the first is whether the case should have been submitted to the jury. Some vital portions of the Government's case were based on circumstantial evidence. The rule with regard to this type of evidence is that for a conviction the evidence must exclude every reasonable hypothesis of innocence. It may well be that the rule is archaic and based upon mistaken premises. It has, however, been reiterated many times in this and other circuits and the present case does not call for reconsideration of

> its correctness. The judge charged the jury in strict accordance with the rule. Specifically he said, 'The evidence which you regard must be such as to exclude every reasonable hypothesis except that of guilt before you may convict. If it does not exclude every hypothesis of innocence you must acquit.' "

In *Sapir v. United States* (1954) 216 F2d 722, appellant was convicted of defrauding the government upon an airplane contract. In reversing the conviction the Court of Appeals of the Tenth Circuit said (p. 724):

> "In order to warrant a judgment of conviction on circumstantial evidence, the facts and circumstances shown must be consistent with each other and with defendant's guilt and inconsistent with any reasonable theory of innocence."

In *Maryland & Virginia Milk Producers Assn. v. United States* (1951) 193 F2d 907, appellants were found guilty of violation of the Sherman Act. In reversing the convictions the Court of Appeals of the District of Columbia Circuit said (p. 917):

> "It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusions. (Citing.)"

In the very recent case of *Carter v. United States* (1957) 252 F2d 608, where the defendant had been convicted of first degree murder, the Court of Appeals

of the District of Columbia Circuit, after quoting an instruction said (p. 612):

> "The foregoing instruction was erroneous. This court has held many times that the rule for the jury is that, unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must not be guilty, and that, where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty. It is not necessary to a verdict of acquittal that on the basis of the facts established a hypothesis of innocence be as likely as one of guilt; any reasonable hypothesis of innocence must be excluded by the facts."

In *Garrison v. United States* (1947) 163 F2d 874, appellant was convicted of making and fermenting mash, working about a distillery, etc. The Court of Appeals of the Fifth Circuit, in reversing the conviction, said (p. 874):

> "A careful examination of the record convinces us that appellant's point is well taken. We think it clear that it cannot be said of the evidence that it pointed unerringly to appellant's guilt and that it is inconsistent with any other hypothesis. The most that can be said of the evidence in the Government's favor is that some of the circumstances were sufficient to raise a suspicion of appellant's guilt, and this, according to settled rules, is not sufficient. It will serve no useful purpose to consider or discuss circumstantial evidence cases. The principle governing them is well settled, and each case rests upon, and must be determined by, its own facts. If the defendant was guilty as charged,

> it was the Government's duty to prove he was. Verdicts may not be based on surmise and suspicion."

To the same effect is *Rodrigues v. United States* (1956, 5th Cir.) 232 F2d 819, which is discussed and quoted at pages 51-52 of appellants' opening brief; and *United States v. Maghinang* (1953, U.S. D.C. Del.) 111 F. Supp. 760, which is discussed and quoted at pages 64 to 66 of appellants' opening brief.

IN ORDER TO SUSTAIN A CONVICTION WHERE POSSESSION IS AN ESSENTIAL ELEMENT THERE MUST BE PROOF OF KNOWLEDGE OF THE EXISTENCE OF THE OBJECT.

In support of the statement in this caption appellant respectfully refers this Court to his treatment of the subject at pages 67 to 70 of Appellants' Opening Brief, and to the cases of *People v. Antista* (1954) 129 C.A.2d 47,[8] and *People v. Gory* (1946) 28 Cal. 2d 450, which are there discussed and quoted at length. The Government made no comment upon either of those cases in its Brief for Appellee, and appellant believes that the rule as stated in those cases is the established law of the State of California and of the Ninth Circuit, and that its application to the facts of the instant case must compel the conclusion that "possession" was not established by the Government.

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[8]Cited with approval by this Court in its opinion (page 10, slip opinion, note 10).

NO CONVICTION CAN BE SUSTAINED SO LONG AS THERE REMAINS A REASONABLE DOUBT AS TO THE GUILT OF THE DEFENDANT.

The Supreme Court, in *Brinegar v. United States* (1949) 69 S. Ct. 1302, where defendant had been convicted of importing intoxicating liquor from Oklahoma into Missouri, in violation of a federal statute, speaking through Mr. Justice Rutledge, said (p. 1310):

> "Guilt in a criminal case must be proven beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

In *Demetree v. United States* (1953) 207 F2d 892, where appellant had been convicted of income tax evasion, the Court of Appeals of the Fifth Circuit reversed the conviction. After discussing the method employed by the Government of offering countless exhibits and relying upon the necessity for defendant to deny them, and thus "explain all of it away as part of his burden to prove his innocence" the court said (p. 894):

> "Most of the courts, however, confronted with the situation which this kind of case presents, have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials pro-

ceed, that the defendant is presumed innocent until his guilt is established by legal and admissible evidence beyond a reasonable doubt."

NEITHER CONJECTURE NOR SUSPICION MAY BE PERMITTED TO SUSTAIN A CONVICTION.

In *Wesson v. United States* (1949—8th Cir.) 172 F2d 931, which was a case where the defendant had been convicted of violating the narcotics law, and in which his conviction was reversed, the Court said (p. 933):

> "To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. (Citing many cases). In Read v. United States, 8 Cir., 42 F2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well-settled in this circuit. In Salinger v. United States [8 Cr.] 23 F2d 48, 52, this court said: "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all of the evidence is as consistent with innocence as with guilt, it is the duty

> of this court to reverse a judgment against the accused.” ’ ”

In *Thomas v. United States* (1956) 239 F2d 7, the Court of Appeals of the Tenth Circuit, in reversing a narcotics conviction, took occasion to say (p. 10):

> “Evidence which creates a mere suspicion of guilt is not sufficient to sustain a verdict of guilt.”

The case of *Johnson v. United States* (1952) 195 F2d 673, is particularly applicable for the reason that it involves the necessity of proof of *possession.* This case concerned conviction of interstate transportation of a stolen automobile. The Court of Appeals of the Eighth Circuit reversed the conviction. The car was actually stolen by one Bell, who picked up defendant without preconcert—drove him about for awhile—picked him up again three days later and with Bell driving the car they were halted by police officers. Bell “made a run for it”—directing Johnson to stay in the car. There was no evidence that defendant had anything other than that to do with the car. Further statement of the facts here is not essential. Petitioner desires to call attention of this Court to the fact that the Court of Appeals there said (p. 676):

> “There is nothing in the evidence—and we have taken the trouble of going through the entire transcript of testimony—to indicate that defendant had any control over the movement of this car as charged in Count 2 of the indictment. So far as he was concerned it was the car of the

> man who stole it and Bell alone conducted and determined the course and direction of this car. There is nothing to indicate that defendant asserted any interest in the car or that there was any purpose of profit to defendant from its theft. As said by us in Cox v. United States, supra [96 F2d 43], proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction. See, also: (Citing.)
>
> *   *   *   *   *   *   *
>
> The circumstances proved in this case are not inconsistent with defendant's innocence and mere suspicion or conjecture is not sufficient to sustain a conviction."

CONCLUSION.

Surely—for the many reasons and upon the authorities set forth in this petition—the circumstances established by the evidence in this case with respect to this small packet of marihuana are far more inconsistent with the guilt of appellant than they are with his innocence. With innocence, they *are* consistent—and so long as that situation prevails the conviction is improper and, petitioner believes, must be set aside upon rehearing of the cause.

So important does the Supreme Court of the United States regard the preservation and *enforcement* of the rights of defendants in criminal cases that it has been for some years—and presently is—flying directly in the face of outraged public sentiment, as expressed by the newspapers, the veterans organizations, and

(yes) the politicians. Unwavering and unswayed, that Honorable Court is upholding constitutional rights and privileges.

Appellant most respectfully suggests to this Court that a reconsideration of the evidence in this case as directed to Count 3, alone, will disclose that such evidence wholly fails to support the judgment of conviction—and that this Court *must*—in following the established law and in accordance with the elementary principles of fairness and justice—order the reversal of such conviction.

PRAYER.

For all of the reasons hereinabove set forth petitioner respectfully prays that this Court set the cause down for reconsideration and rehearing; and in the event the Court fails so to do petitioner respectfully prays that the Court stay its mandate pending the filing by petitioner and appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by that Court.

Dated, San Francisco, California,
June 23, 1958.

Respectfully submitted,
Arthur D. Klang,
Attorney for Appellant and Petitioner William Evans.

Certificate

I, Arthur D. Klang, attorney for William Evans, one of the appellants herein, certify that this petition is presented in good faith; that it is not interposed for delay; and that in my judgment it is well founded.

Dated, San Francisco, California,
June 23, 1958.

Arthur D. Klang.